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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 689

ISRAEL G. HALPERT, AS TRUSTEE IN BANKRUPTCY OF THE CARBURETOR CORPORATION,

Petitioner,

against

ENGINE AIR SERVICE, INC., LAWRENCE A. HAUFT, LENA P. HAUFT, WALTER S. BURFOOT AND MAY D. BURFOOT,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MAX SCHWARTZ,
Counsel for Petitioner.

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Respondents

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Israel G. Halpert, as Trustee in Bankruptcy of The Carburetor Corporation, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Second Circuit, to review the decree of that Court, filed February 26, 1953 (R. 205a), reversing the order of the District Court of the United States for the Eastern District of New York, dated July 15, 1952 (R. 180a).

The order of the District Court dismissed the respondents' petition to review and confirmed the order of Honorable Sherman D. Warner, Referee in Bankruptcy, dated December 17, 1951 (R. 147a):

1. Adjudging Engine Air Service, Inc. to be but an agency or division of The Carburetor Corporation, with title to

all of the assets vested in The Carburetor Corporation from on and after May 4, 1949.

2. Adjudging that the respondents, Engine Air Service, Inc., Lawrence A. Hauft, Lena P. Hauft, Walter S. Burfoot and May D. Burfoot are estopped to deny, by reason of their acts and conduct, that there has been a merger between Engine Air Service, Inc. and The Carburetor Corporation and that Engine Air Service, Inc. is part and parcel of The Carburetor Corporation and that all of the assets of Engine Air Service, Inc., are part of the assets of The Carburetor Corporation, by reason of the contract made on May 4, 1949 and the ensuing acts and conduct of both corporations and the acts and conduct of the individuals in the operation of business between May 4, 1949 and January 20, 1950.

3. Dismissing and overruling and denying the special appearances on behalf of respondents.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit appears in the record at pages 199a-204a and is not yet reported.

The opinion of the District Court is found in the record at pages 166a-180a and has not as yet been officially reported.

The opinion of the Referee in Bankruptcy is found in the record at pages 48a-147a and has not as yet been officially reported.

Jurisdiction

The decree of the United States Court of Appeals for the Second Circuit sought to be reviewed, was filed on February 26, 1953 (R. 205a).

The jurisdiction of this Court is invoked under Section 24(c) of the Bankruptcy Act and 11 U. S. C. A. Sec. 47(c)

as amended by the Act of June 25, 1948, C. 646, Sec. 39, 62 Stat. 992 and July 7, 1952, C. 579, Sec. 9, 66 Stat. 423, and 28 U. S. C. A. Sec. 1254, Act of June 25, 1948, C. 646, 62 Stat. 928.

Summary Statement of Matters Involved

Israel G. Halpert, as Trustee herein, by a petition and order to show cause thereon, moved before Honorable Sherman D. Warner, Referee in Bankruptcy, amongst other things, for an order adjudging Engine Air Service, Inc., to be part and parcel and an agency or instrumentality of The Carburetor Corporation, with title to all of the assets vested in The Carburetor Corporation from on and after May 4, 1949 and adjudging that the respondents, Engine Air Service, Inc., Lawrence A. Hauft, Lena P. Hauft, Walter S. Burfoot and May D. Burfoot, were estopped to deny by reason of their acts and conduct that there had been a merger between Engine Air Service, Inc., and The Carburetor Corporation; that Engine Air Service, Inc., was part and parcel of The Carburetor Corporation, and that the assets of Engine Air Service, Inc., were part of the assets of The Carburetor Corporation by reason of the contract made on May 4, 1949 and the ensuing acts and conduct of both corporations and the acts and conducts of the individuals in the conduct of business between May 4, 1949 and January 20, 1950.

An answer was interposed by Engine Air Service, Inc., Lawrence A. Hauft, Lena P. Hauft, Walter S. Burfoot and May D. Burfoot, wherein they appeared specially for the purpose of objecting to the summary jurisdiction of the Court.

Hearings were had upon the issues before the Referee in Bankruptcy. Some 1,600 pages of testimony were adduced and over 100 exhibits introduced in evidence. Witnesses were examined in support of the Trustee's case and cross-

examined at great length by the attorney for the respondents, who in several instances made these witnesses his own by the new matter introduced on his examination.

The issues presented to the Referee in Bankruptcy for decision were:

1. Were the assets sought to be recovered by the Trustee in the actual or constructive possession of the debtor-bankrupt at the time of the filing of the petition under Chapter XI herein, so as to vest the Bankruptcy Court with summary jurisdiction? and

2. Was Engine Air Service, Inc., part and parcel and an agency or instrumentality of The Carburetor Corporation, and hence subject to the summary jurisdiction of the Bankruptcy Court?

The case of the Trustee was based on the fact that

1. The debtor-bankrupt was in actual or constructive possession of the assets sought to be recovered at the time of the filing of the petition herein by reason of which the Bankruptcy Court had summary jurisdiction, and

2. That Engine Air Service, Inc. was part and parcel and but an agency or instrumentality of The Carburetor Corporation, the debtor-bankrupt, from on and after May 4, 1949, down to the filing of the petition on February 24, 1950, so as to vest the Bankruptcy Court with summary jurisdiction over the issues presented by the pleadings.

On these issues and the record, the Referee rendered a very extensive opinion (R. 48a-147a), making a detailed analysis of the testimony, findings of fact and conclusions of law. On December 17, 1951, an order (R. 147a) was entered upon the Referee's opinion, which found that on the date of the filing of the petition the debtor-bankrupt was in actual and constructive possession of the assets sought to be recovered, by reason of which the Bankruptcy Court had

summary jurisdiction, and further, that Engine Air Service, Inc., was part and parcel and an agency or instrumentality of the bankrupt by reason of which it had no separate entity, and its alleged adverse claim only colorable, and therefore, the Bankruptcy Court had summary jurisdiction to determine the issues.

Upon review, Honorable Leo F. Rayfiel, District Judge, in his opinion (R. 166a), found that there had been a de facto merger of Engine Air Service, Inc., with The Carburetor Corporation, that Engine Air Service, Inc., was part and parcel and an agency and instrumentality of The Carburetor Corporation, and further, that the assets were in the actual or constructive possession of the debtor-bankrupt at the time of the filing of the petition, by reason of which the Bankruptcy Court had summary jurisdiction, and affirmed in all respects that findings of fact and conclusions of law of the Referee. An order upon the Judge's opinion was entered on July 15, 1952. (R. 180a).

From the testimony and record adduced at the hearing, it was established and found both by the Referee in Bankruptcy and the District Court, amongst other things, as follows:

"After May 4, 1949

(1) Carburetor operated what had been two separate businesses with one set of books, one bank account, one set of employees, one stockroom and one telephone.

(2) Carburetor used the names 'The Carburetor Corporation,' 'Engine Air Service Inc.,' and 'The Carburetor Corporation operating Engine Air Service Inc.,' in soliciting business. Its stationery, invoices, orders, etc., bore the heading: 'The Carburetor Corporation operating Engine Air Service Inc.'

(3) Engine's bills, as of May 7, 1949, were assumed and paid by Carburetor, in addition to which Engine's accounts, when collected, were deposited in Carburetor's bank account.

(4) There was a complete commingling of the assets of both corporations and there was only one set of inventory bins, one stockroom and one set inventory cards.

(5) Carburetor used the inventory and machinery of both corporations without distinction and there were no tags, labels or signs on either the inventory bins or the machinery to indicate ownership.

(6) The office equipment was used by the officers of both corporations.

(7) There were one set of officers and four active directors common to both corporations.

(8) Carburetor mortgaged the machinery and fixtures of both corporations on December 23, 1949, and on January 12, 1950, the corporate certificate dated December 23, 1949, and the chattel mortgage were both signed by the respondent Burfoot with the knowledge of the other respondents.

(9) Carburetor made substantial improvements to the real estate and constructed new buildings on the property although the title to the premises was vested in Engine, Carburetor holding a lease which was cancelable on ten days' notice. The cost of the improvements and new construction was in excess of $68,000 and work was done with the knowledge and consent of the individual respondents. Carburetor paid part of the cost of the said work to the contractors and listed them as unsecured creditors to the extent of the unpaid balances.

(10) Carburetor's schedules show unsecured creditors in the sum of $127,341.84. These obligations were incurred while Carburetor was in possession and control and conducted the business of both corporations. A substantial number of these creditors supplied the labor and materials which were used in the improvement of the premises. This virtually complete absorption of Engine continued until about January 23, 1950, when the individual respondents attempted to recapture Engine's assets at the time when Carburetor's financial position was very precarious. Up to that time

they had consented to the indiscriminate commingling of the assets and liabilities of both corporations. In fact, Burfoot, who with his wife, owned 50% of the outstanding shares of stock in Engine, was employed during this period by Carburetor, and was a director of that company.

The Referee found and the District Court affirmed that as of the date of the filing of the petition, The Carburetor Corporation was in actual possession of the premises along with Engine Air Service, Inc., that the offices were jointly used and occupied by both corporations by employees on the payroll of The Carburetor Corporation, that both corporations used one set of inventory records both prior and subsequent to said date, that both corporations continued to use the office employees of The Carburetor Corporation for the purpose of making entry in the records, taking care of correspondence, and telephones and that there was pending undetermined, a dispossess proceeding in the local courts of the State of New York on the part of Engine Air Service, Inc., against The Carburetor Corporation for the purpose of dispossessing The Carburetor Corporation from the premises occupied by it and that The Carburetor Corporation was in possession of these premises on February 24, 1950, the date of the filing of the petition.

From the order entered by the District Court, an appeal was taken to the United States Court of Appeals for the Second Circuit, which rendered its opinion (R. 199a), reversing the order of the District Court and dismissing the petition upon the grounds that the claims of the respondents were not merely colorable, and as there were factual and legal disputes involved, the Court was without summary jurisdiction.

The Court of Appeals did not find the findings of fact and conclusions of law made by the Referee in Bankruptcy and

affirmed by the District Court to be clearly erroneous particularly as to Engine Air Service, Inc. being part and parcel and an agency and instrumentality of The Carburetor Corporation, by reason of which the Bankruptcy Court would have summary jurisdiction and also as to the debtor-bankrupt being in possession of the assets sought to be recovered by the Trustee as of the date of the filing of the petition herein, likewise by reason of which the Bankruptcy Court would have summary jurisdiction.

The Court of Appeals did find there were complicated issues of fact and legal problems involved, that the respondents were also apparently in possession of the premises under a claim of right not merely colorable, by reason of which the claim of the respondents was not merely colorable and the Bankruptcy Court without summary jurisdiction.

The Court of Appeals in its opinion states, "On February 23, 1950 the lessor claims to have taken actual possession of the real estate and personal property" and further states that "as of the date the lessee (bankrupt) filed its petition for an arrangement (February 24, 1950), the lessor (Engine Air Service, Inc.) was apparently in possession of the premises under a claim of right far from merely colorable." The Court was in error with respect to both of these statements. The claim of possession on the part of Engine Air Service, Inc. was based on an illegal re-entry by force and self-help and without the consent or approval of the bankrupt as was found by the Referee, and which finding was undisturbed by the Court of Appeals. This perhaps accounts for the qualified statement that the lessor was apparently in possession of the premises, for the fact is that The Carburetor Corporation was in actual possession not only on February 24, 1950, the date of the filing of the petition, but down to the adjudication in bankruptcy on April 20, 1950, and it continued to carry on its business operations

with its employees actually performing their services down to March 13, 1950, some three weeks after the filing of the petition. Thus, at worst for the Trustee, there was at the time of the filing of the petition and thereafter down to the adjudication in bankruptcy, joint possession, with The Carburetor Corporation actually conducting its own business on the date of the filing of the petition and for some three weeks thereafter.

But the Court was in error in so holding, for joint possession does not deprive the Bankruptcy Court of summary jurisdiction, and possession, even if joint and not exclusive, still confers summary jurisdiction. And if the respondent corporation is part and parcel of the bankrupt and an agency or instrumentality thereof, so that it has no separate entity, it has no bona fide adverse claim and is subject to the summary jurisdiction of the Court.

The Court was further in error in deeming the issues (1) with respect to the lease; (2) the bankrupt's default under its contract to purchase the stock of Engine Air Service, Inc., and (3) the adoption of the contract by the Trustee, as matters affecting the summary jurisdiction of the Bankruptcy Court.

These questions involve questions of fact and law, but cannot affect, add to, or detract from, the summary jurisdiction of the Bankruptcy Court, if there had been a merger of the corporations, and Engine Air Service, Inc. was part and parcel and an agency and instrumentality of the bankrupt, or if the bankrupt, on the date of the filing of the petition, was in actual or constructive possession of the property sought to be recovered by the Trustee.

Both the Referee and the District Court considered these matters and found that they did not in any wise have any bearing on the question of possession or on the question of whether Engine Air Service, Inc. was part and parcel and an agency or instrumentality of the bankrupt, or the

summary jurisdiction of the Bankruptcy Court. By the widest stretch of imagination it cannot be conceived how they can possibly affect these issues.

Questions Presented

Does the Bankruptcy Court have summary jurisdiction where there is actual or constructive possession of the property sought to be recovered, even though the adverse claim is substantial and there are complicated factual and legal disputes involved?

Does the Bankruptcy Court have summary jurisdiction where the respondent corporation is part and parcel and but a dummy or instrumentality or agency of the bankrupt corporation?

Where findings of fact and conclusions of law are made by a Referee in Bankruptcy, based upon the observation of witnesses examined before him, may the order be reversed by the United States Court of Appeals without the Court finding the findings of fact and conclusions of law of the Referee in Bankruptcy, affirmed by the District Court, to be clearly erroneous?

Specification of Error

The United States Court of Appeals erred:

1. In holding that, simply by reason of the fact that there were complicated factual and legal disputes involved and that the respondents were apparently in possession of the premises under a claim of right not merely colorable, that the Court was without summary jurisdiction, notwithstanding the fact that both the Referee in Bankruptcy and the District Court had found that the debtor-bankrupt was in actual possession of all of the assets sought to be recovered at the time of the filing of the petition and that all of the assets were in the actual or constructive possession of the

Court at the time of the filing of the petition herein and the United States Court of Appeals did not find that the Referee and the District Court were clearly erroneous in their findings of fact and conclusions of law.

2. In holding that the Bankruptcy Court did not have summary jurisdiction where both the Referee in Bankruptcy and the District Court had found that there had been a merger between Engine Air Service, Inc. and The Carburetor Corporation and that Engine Air Service, Inc. was part and parcel and an agency or instrumentality of The Carburetor Corporation, and where the Court did not find that the Referee and the District Court were clearly erroneous in such findings of fact and conclusions of law.

3. In failing to give heed to the fact that the Bankruptcy Court had summary jurisdiction, notwithstanding the fact that the adverse claim might be substantial and that complicated factual or legal disputes were involved where the assets sought to be recovered were in the actual or constructive possession of the debtor-bankrupt at the time of the filing of the petition in bankruptcy.

Reasons Relied On for the Allowance of the Writ

The United States Court of Appeals in its opinion indicates that the reason for the reversal of the order of the District Court and the dismissal of the petition is that there are complicated legal and factual disputes involved and that the adverse claim of the respondents is not merely colorable.

The opinion of the Court does not find that the Referee and District Court were clearly erroneous in their findings and conclusions that the property sought to be recovered by the Trustee was in the actual or constructive possession of the debtor-bankrupt at the time of the filing of the petition herein, and further, that there had been a

merger between Engine Air Service, Inc. and The Carburetor Corporation and that Engine Air Service, Inc. was part and parcel and an agency or instrumentality of The Carburetor Corporation.

Granting the Court of Appeals that there are serious and complicated factual and legal disputes involved, that does not make the adverse claim of the respondents substantial if there had been a merger between Engine Air Service, Inc. and The Carburetor Corporation, and Engine Air Service, Inc. was part and parcel and an agency and instrumentality of The Carburetor Corporation, or if the assets sought to be recovered were in the actual or constructive possession of the debtor-bankrupt at the time of the filing of the petition herein.

Heretofore, the test laid down and every decision of this Court and in every other United States Court of Appeals has been that the Bankruptcy Court has summary jurisdiction where there is either actual or constructive possession of the property sought to be recovered at the time of the filing of the petition or if the claim of the respondents is merely colorable, and if either element is established, the Bankruptcy Court has summary jurisdiction.

At no time has this Court ever denied summary jurisdiction in a Bankruptcy Court where it was established and held that the property sought to be recovered was in the actual or constructive possession of the Court.

It has also been consistently held by this Court and every other United States Court of Appeals that where it is established that the respondent corporation is part and parcel and an agency or instrumentality of the bankrupt, the respondent has no separate entity, is not a bona fide or adverse claimant, but is the bankrupt and subject to the summary jurisdiction of the Court.

If the respondent corporation has no separate entity and is part and parcel of the bankrupt, any adverse claim

asserted by such respondent can only be a colorable claim and not a substantial one, and under such circumstances, the Bankruptcy Court has summary jurisdiction to determine the issues.

Here, the Referee in Bankruptcy and the District Court found that the respondent, Engine Air Service, Inc. has no separate entity, was part and parcel and an agency and instrumentality of the bankrupt and by reason thereof, its adverse claim merely colorable so that the Bankruptcy Court had summary jurisdiction to determine the issues. The Court of Appeals did not even intimate any error on the part of the Referee or District Court on this phase of the matter.

The decision of the United States Court of Appeals herein is in conflict with the prior decisions of this Court and all other circuits. It is in direct conflict with the decision in *Sampsell* v. *Imperial Paper & Color Corp.* 313 U. S. 215, *Cline* v. *Kaplan,* 323 U. S. 97, *Stone* v. *Eacho* (C.A. 4) 127 F. 2d 284, cert. den., 317 U. S. 635, *Fish* v. *East,* (C.A. 10) 114 F. 2d 177.

Inasmuch as it was heretofore settled law that the Bankruptcy Court had summary jurisdiction if the respondent was part and parcel and an agency and instrumentality of the bankrupt; that the Bankruptcy Court had summary jurisdiction if the property sought to be recovered was in the possession of the bankrupt at the date of the filing of the petition, it is respectfully urged that this Court assume jurisdiction in order to avoid confusion and impairment of the prior decisions of this Court and other circuits and the imposition of a new rule that the mere existence of a substantial adverse claim presenting complicated issue of fact and law deprive a Bankruptcy Court of summary jurisdiction notwithstanding the fact that the property sought to be recovered was in the possession of the bankrupt at the time of the filing of the petition, and further,

notwithstanding the fact that the respondent is part and parcel and an agency or instrumentality of the bankrupt.

As the decision of the United States Court of Appeals herein will unsettle the question of the jurisdiction of the Bankruptcy Court and is in conflict with the decisions of this Court and those of the other circuits, it is respectfully urged that the questions involved herein should be settled by this Court.

ARGUMENT

Point A

The Decision Herein Is at Variance With the Decisions Rendered by This Court and Every Other United States Court of Appeals, That Where the Respondent Is Part and Parcel and an Agency or Instrumentality of the Bankrupt Corporation, It Has No Separate Entity and Has No Adverse Claim by Reason of Which the Bankruptcy Court Has Summary Jurisdiction Over the Respondent.

In *Stone* v. *Eacho*, (C.A. 4) 127 F. 2d 284, *cert. den.*, 317 U. S. 635, the issues involved were similar to those presented here and it was held that the Bankruptcy Court had summary jurisdiction and the objections of the respondent were without merit and its adverse claim merely colorable where the respondent was part and parcel and an agency of the bankrupt.

In *Fish* v. *East*, (C.A. 10) 114 F. 2d 177, very analogous to the situation at bar, the Bankruptcy Court held there was summary jurisdiction and overruled the adverse claim asserted that the respondent was a separate corporate entity, holding that the instrumentality rule was often involved and applied in proceedings for turnover orders and granted the turnover order.

In *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U. S. 215, this Court held that the Bankruptcy Court had sum-

mary jurisdiction and affirmed the order of the Referee granting a turnover order, holding that the legal existence of an affiliated corporation does not per se give it the right to insist on a plenary suit and that mere legal paraphernalia will not transform into a substantial adverse claim a corporation whose affairs are so closely assimilated to the affairs of the dominant stockholder that in substance it is little more than his corporate pocket.

In the following instances, courts have held in summary proceedings in bankruptcy that the Bankruptcy Court had summary jurisdiction and that the adverse claim was merely colorable by reason of the fact that the respondent did not have any separate entity and was part and parcel of the bankrupt, granting a turnover order on the Trustee's motion. *In re Clark Supply Co., Inc.,* (C.A. 7) 172 F. 2d, 248, 254; *In re Todd Building Corp.,* (C.A. 7) 172 F. 2d, 254, 257; *In re Western Bond & Mortgage Co.,* 44 F. Supp. 89, aff'd (C.A. 9) 132 F. 2d 769; *In re Eiler's Music House,* (C.C.A. 9) 270 F. 915, 925; in *W. A. Liller Bldg. Co.* v. *Reynolds* (C.C.A. 4) 247 F. 90; *In re Muncie Pulp Co.,* (C.C.A. 2), 139 F. 546, *cert. den.* 202 U. S. 621; *In re Belt Modes,* 88 F. Supp. 141, *Rev'd Hollander* v. *Henry* (C.C.A. 2) 186 F. 2d 582; *cert. den.,* 341 U. S. 949; *Hamilton Ridge Lumber Sales Corp.* v. *Wilson,* (C.C.A. 4) 25 F. 2d 592; *Edward Finch Co.* v. *Robie,* (C.C.A. 8) 12 F. 2d 360.

This Court has repeatedly held that the corporation fiction would be disregarded and the corporate entity pierced where to regard the corporate entity would result in a fraud and injustice upon the creditors. Here, there can be no question but that the creditors will be defrauded to the extent of their claims in excess of $150,000.00 if the corporate entity of Engine Air Service, Inc. is not disregarded and pierced. *Pepper* v. *Litton,* 308 U. S. 295; *Taylor* v. *Standard Gas & Electric Co.,* 96 F. 2d 693, aff'd 306 U. S. 307, 322; *Henry* v. *Dolley,* (C.A. 10) 99 F. 2d 94; *In re*

Loewer's Gambrinus Brewery, (C.A. 2) 167 F. 2d 318, 319; *Henderson* v. *Rounds & Porter Lumber Co.,* 99 F. Supp. 376, 383; *Weisser* v. *Mursam Shoe Corp.,* (C.A. 2) 127 F. 2d 344, 347.

In addition to the foregoing, attention is called to the fact that equitable ownership of all of the capital stock of Engine Air Service, Inc. became vested in The Carburetor Corporation under the purchase agreement as of May 4, 1949 pending final consummation of the sale, *Storer Broadcast Co.* v. *Jack The Bellboy* (D.C. Mich.) 107 F. Supp. 988, 993. See also, *C. M. Lamp Co.* v. *U. S.,* (C.A. 6) 201 F. 2d 465, 468, under which legal title to all of the stock of Engine Air Service, Inc. might be deemed to be vested in the bankrupt. Thus Engine Air Service, Inc. was under equitable principles, a wholly owned subsidiary of The Carburetor Corporation from on and after May 4, 1949.

There was a de facto merger here within the Rule of *Helvering* v. *Metropolitan Edison Co.,* 306 U. S. 522, 59 S. Ct. 634.

Notwithstanding the fact that both the Referee and the District Court found there had been a merger between the Engine Air Service, Inc. and The Carburetor Corporation and that Engine Air Service, Inc. was part and parcel and an agency and instrumentality of the bankrupt, and though the United States Court of Appeals did not find that there had been any error on the part of the Referee or the District Court in so finding, nevertheless, the Court of Appeals has reversed the order of the Referee and dismissed the proceeding.

It is respectfully submitted that such holding is in conflict with the decisions of this Court and the other circuits as well as the prior decisions of the United States Court of Appeals for the Second Circuit that it throws into question the jurisdiction of the Bankruptcy Court by reason of which these doubts should be resolved by the granting

of the writ sought, the assumption of jurisdiction by this Court, and the determination of the issues raised.

POINT B

The Decision of the United States Court of Appeals Is Contra to and in Violation of Rule 52 of the Federal Rules of Civil Procedure and General Order 47 of the General Orders in Bankruptcy in That the Court Failed to Find That the Referee in Bankruptcy and the District Court Were Clearly Erroneous in Their Findings and Conclusions That Engine Air Service, Inc. Was Part and Parcel and an Agency and Instrumentality of the Carburetor Corporation and That the Property Sought to Be Recovered Was in the Actual or Constructive Possession of the Debtor-Bankrupt, and the Bankruptcy Court on the Date of the Filing of the Petition.

The United States Court of Appeals for the Second Circuit in its opinion herein failed to follow its own rule as well as the rule announced in every other United States Court of Appeals, that the findings of the Referee in Bankruptcy affirmed by the District Court will not be disturbed on appeal unless the court can say that the findings are clearly erroneous. *Dickinson* v. *Burnham,* (C.A. 2) 197 F. 2d 973; *Morris Plan Industrial Bank* v. *Henderson,* (C.A. 2), 131 F. 2d 975; *Abrams* v. *Astor,* (C.A. 2), 170 F. 2d 544, 545; *Broadcast Music, Inc.* v. *Havana Madrid Restaurant Corporation,* (C.A. 2), 175 F. 2d 77; *Orvis* v. *Higgins,* (C.A. 2) 180 F. 2d 537; *In re Caplan,* (C.A. 2), 149 F. 2d 731; *Oneida Valley National Bank* v. *Balish,* (C.A. 2), 130 F. 2d 255; *In re Gurinsky,* (C.A. 2), 196 F. 2d 296.

The Referee's opinion (R. 48a-147a), sets forth a detailed analysis of the facts as well as the findings of fact and conclusions of law with respect to a merger of

Engine Air Service, Inc. with The Carburetor Corporation, that Engine Air Service, Inc. is part and parcel and an agency or instrumentality of The Carburetor Corporation and also with respect to the actual and/or constructive possession of the property sought to be recovered by the Trustee in the debtor-bankrupt at the time of the filing of the petition thereof.

Nowhere in the opinion of the United States Court of Appeals is there any disagreement or intimation that the Referee or the District Court were clearly erroneous in their findings or conclusions, that there had been a merger of the corporations, that Engine Air Service, Inc. was part and parcel and an agency or instrumentality of The Carburetor Corporation and that The Carburetor Corporation was in actual and/or constructive possession of the property sought to be recovered on the date of the filing of the petition.

In the absence of such a finding, and it is submitted the record amply supports the findings under Rule 52 and General Order 47, the order of the District Court should have been affirmed and it is respectfully submitted that the decision of the United States Court of Appeals is contra to and in conflict with Rule 52, General Order 47, the decisions of this Court and all the other United States Courts of Appeal by reason of which this Court should assume jurisdiction and determine the issues involved herein.

POINT C

The Decision Herein Is at Variance and in Conflict With the Decisions Rendered by This Court and Every Other United States Court of Appeals, That Where the Property Sought to Be Recovered Is in the Actual or Constructive Possession of the Bankruptcy Court, the Bankruptcy Court Has Summary Jurisdiction Notwithstanding the Fact the Adverse Claim May Be Substantial, Involving Serious Questions of Fact and Law.

This Court and likewise every other United States Court of Appeals have repeatedly expressed the rule that the determining factor of summary jurisdiction of a Bankruptcy Court is "possession", not title. If possession is shown to be present, the Bankruptcy Court has summary jurisdiction regardless of the nature of the adverse claim or of the issues of fact and law involved. *Cline* v. *Kaplan*, 323 U. S. 97; *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U. S. 215; *Harrison* v. *Chamberlain*, 271 U. S. 191; *Muller* v. *Nugent*, 184 U. S. 1; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 481; *Fish* v. *East*, (C. A. 10) 114 F. 2d 177; *In re Clark Supply Co., Inc.*, (C.A. 7) 172 F. 2d 248, 254; *In re Todd Building Corp.*, (C.A. 7) 172 F. 2d 254, 257.

Where the Court has summary jurisdiction it has jurisdiction to determine any and all issues between the Trustee and the respondents. *Gardner* v. *New Jersey*, 329 U. S. 565, 573; *Alexander* v. *Hillman*, 296 U. S. 222; *Vought* v. *Giffin*, (C.A. 2) 175 F. 2d 186; *In re Solar Mfg. Co.*, (D.C. N. J.) 102 F. Supp. 859, aff'd. (C.A. 3) 200 F. 2d 347.

Here, the Referee and the District Court both found that the property sought to be recovered by the Trustee was in the actual and/or constructive possession of the debtor-bankrupt at the date of the filing of the petition. The find-

ings of the Referee affirmed by the District Court are based upon the fact that the bankrupt was in actual possession of the premises, its employees in possession of the office, its assets in the premises with one set of books being used for both corporations, plus the fact that the possession of the debtor-bankrupt was recognized by the respondents by the institution of a dispossess proceeding in the local State Courts which was pending undetermined at the time of the filing of the petition herein.

These findings as to the debtor-bankrupt being in possession of the property sought to be recovered were not disturbed nor found to be erroneous by the United States Court of Appeals, but the Court by reason of the fact that it found that there were complicated factual and legal disputes present herein, and that the respondent, Engine Air Service, Inc., as alleged lessor was apparently in possession of the premises under a claim of right, that the claims of the respondents were not merely colorable and the Bankruptcy Court without summary jurisdiction.

Attention must be called to the fact that after May 4, 1949, The Carburetor Corporation was the equitable owner of all of the capital stock of Engine Air Service, Inc., and had actual possession of all of the assets, including real property from on and after said date. The bankrupt never surrendered possession and was never ousted from possession. It was in possession of the premises with a dispossess proceeding pending against it on February 24, 1950, the date of the filing of the petition herein. These facts and findings are undisturbed by the opinion of the Court of Appeals.

In this regard, it is submitted that the United States Court of Appeals committed error, overlooking the fact that possession by the debtor-bankrupt whether actual or constructive at the time of the filing of the petition, conferred and vested the Bankruptcy Court with summary jurisdic-

tion, regardless of whether or not the respondents' claims were substantial and complicated factual and legal issues were involved.

The doctrine of co-possession was approved and applied in *Uebersee Finanz-Korporation A. G.* v. *McGrath,* (U. S. C. A. D. C.), 196 F. 2d 557 and approved of by this Court in 343 U. S. 205. Also in *Fish* v. *East,* (C. A. 10) 114 F. 2d 177, where the Bankruptcy Court held it had summary jurisdiction where there was co or joint possession in a proceeding very similar to that at bar. And possession by the bankrupt even though not exclusive was held to give the Bankruptcy Court summary jurisdiction, *Herbert* v. *Crawford,* 228 U. S. 204; *In re Wegman Piano Co.,* (N. D. N. Y.) 228 F. 60; *In re Hooven-Owens A. T. C. Co.,* (C. C. A. 6) 195 F. 424; *Orinoco Iron Co.* v. *Metzel,* (C. C. A. 6) 230 F. 40; 5 Remington on Bankruptcy, Sec. 2365, p. 554; 2 Collier on Bankruptcy (14 Ed) Sec. 2305, p. 463 n. 9. The Court below was in error in failing to likewise follow and apply the doctrine and principles of co-possession or joint possession here.

The decision of the United States Court of Appeals in the present instance is at variance and in conflict with the decisions of this Court, of other Circuits, as well as its own prior decision. The decision unsettles the jurisdiction of the Bankruptcy Court, throwing considerable doubt as to when and under what circumstances the Bankruptcy Court has summary jurisdiction by reason of which it is respectfully urged that this Court assume jurisdiction, grant the writ sought and determine the issues raised herein.

Conclusion

It is, therefore, respectfully submitted that this case by reason of the questions involved and the conflict of opinions, is one calling for the exercise by this Court of its super-

visory powers, in order that important questions in the administration of bankruptcy proceedings and the jurisdiction of the Bankruptcy Court may be settled.

These questions should be finally determined by this Court and a definite determination made with respect to the issues involved in order that the jurisdiction of the Bankruptcy Court may not be seriously impaired and its ability to expeditiously dispose of litigation destroyed.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Second Circuit, sitting at New York, New York, commanding said Court to certify to and send upon to this Court, on a day to be designated, a full and complete transcript of the record and of all proceedings by the United States Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Honorable Court; that the order and decree of the United States Court of Appeals for the Second Circuit be reversed and that your petitioner be granted such other and further relief as may seem proper in the premises.

ISRAEL G. HALPERT,
As Trustee in Bankruptcy of
The Carburetor Corporation

By: MAX SCHWARTZ, *Esq.*,
Counsel to Petitioner

MAX SCHWARTZ, *Esq.*
Of Counsel

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Office - Supreme Court,
FILED
APR 30 1953
HAROLD B. WILLEY, Cl

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 689

ISRAEL G. HALPERT, as Trustee in Bankruptcy of the CARBURETOR CORPORATION,

Petitioner,

—against—

ENGINE AIR SERVICE, INC., LAWRENCE A. HAUFT, LENA P. HAUFT, WALTER S. BURFOOT and MAY D. BURFOOT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Bankrupt was a vendee in default (115a, 201-202) under a contract to purchase from the individual respondents herein all of the capital stock of respondent, Engine Air Service, Inc., for $252,000 (24a-40a). The Trustee-Petitioner, who never adopted the contract or tendered the purchase price thereunder (202), seeks to acquire *for nothing* all of the assets of Engine Air Service, Inc., for which the bankrupt had agreed to pay $252,000.

Also the respondent, Engine Air Service, Inc., was the landlord under a written lease (41a-45a) under which the bankrupt, the tenant, was likewise in de-

fault. The Trustee has not adopted the lease and his time to do so has long since expired.

The United States Court of Appeals for the Second Circuit found that the respondent, Engine Air Service, Inc., was "apparently in possession of the premises under a claim of right far from merely colorable," (202) and "substantial payments were to be made in the future by the bankrupt to these individual claimants, and there has been no adoption of the contract by the trustee" (202). Under the circumstances the United States Court of Appeals correctly stated and applied the law as laid down by this Court.

> *Harrison* v. *Chamberlain,* 271 U. S. 191, 194;
> *Mueller* v. *Nugent,* 184 U. S. 1;
> *Cline* v. *Kaplin,* 323 U. S. 97, 98;
> *Taubel-Scott-Kitzmiller Co.,* 264 U. S. 426;
> *Louisville Trust Co.* v. *Cominger,* 184 U. S. 18, 25, 26;
> *McDonald* v. *Plymouth County Trust Co.,* 286 U. S. 263.

The Petitioner complains that the United States Court of Appeals failed to apply Rule 52, Federal Rules of Civil Procedure. The findings of the trial court are not binding when, as here, the trial court assumed jurisdiction it did not have.

> *Vallely* v. *Northern Fire and M. Ins. Co.,* 254 U. S. 348, 353, 354.

In the *Vallely* case this Court said:

> "The courts are constituted by authority and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly

in contravention of it, their judgments and orders are regarded as nullities. They are not voidable but simply void, and this even prior to reversal."

In face of respondent's special appearance, and their timely objection to the court's jurisdiction (22a-23a), there was nothing for the trial court to do but to relegate the Trustee-Petitioner to a plenary suit. United States Bankruptcy Act, Sections 2, 23(b), 11 U. S. C. 11, 46(b).

None of the questions set forth in Rule 38(5b) of this Court, nor any like questions, arises upon this petition so as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

JAMES G. MOORE,
Attorney for Respondents,
Appearing specially to contest
the Court's jurisdiction.

JAMES G. MOORE,
EMERSON A. SWARTZ,
Of Counsel.

THE COURT PRESS, N. Y. C.

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